Petition

81-1495

No.

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

VERNON P. MOORE - - - - **Petitioner**

versus

EMILY JORDAN and
BUFFORD JORDAN - - - - **Respondents**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Common Pleas, Warren County, Ohio, have jurisdiction in a malpractice action over an attorney at law arising from acts of professional negligence which allegedly occurred in a civil action filed in the Knox Circuit Court in Barbourville, Kentucky; and where the Kentucky attorney had no contact, with the plaintiffs-appellees in Ohio, nor any contact with the State of Ohio at all?

2. Did the defendant-appellant attorney forfeit his right to question the jurisdiction of the Court of Common Pleas of Warren County, Ohio by his failure to appeal from that Court's Order overruling his motion to dismiss the action against him for lack of jurisdiction?

TABLE OF CONTENTS

PAGE

Questions Presented ..... i, 2

The Opinion Below 1

Jurisdiction 1

Constitutional Provisions Involved 2

Statement of the Case 2– 5

Reasons for Granting the Writ 6–13

I. Where the Court of Common Pleas of Warren County, Ohio asserted jurisdiction in a malpractice action over an attorney who practiced in Kentucky for an act of professional negligence which occurred in connection with a civil action filed by him in the Knox Circuit Court in Barbourville, Kentucky, and that Kentucky attorney had no contact with the respondent clients in Ohio, nor any contact with the State of Ohio, it acted without authority and in violation of the petitioner's right to due process under the Fourteenth Amendment 6–11

Kulko v. California Superior Court, 436 U. S. 84, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978). 6, 8

World-Wide Volkswagen Corp. v. Woodson, 444 U. S. 286, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980) 9, 11

II. The petitioner, Moore, did not forfeit his right to question the jurisdiction of the Court of Common Pleas of Warren County, Ohio, but his failure to appeal from that Court's Order overruling his Motion to dismiss the action against him for lack of jurisdiction 11–13

International Shoe Co. v. Washington, 326 U. S. 316, 90 L. Ed. 95, 66 S. Ct. 154 (1954) 13

PAGE

Baldwin v. Iowa State Traveling Men's Association, 283 U. S. 522, 75 L. Ed. 1245..... 13

Conclusion 14

Appendix 15–32

Order and Judgment of the Court of Appeals affirming Judgment of District Court 15

Complaint filed in Federal District Court to which is attached 16–25

A. Judgment in Common Pleas Court of Warren County, Ohio 20–21

B. Summary Judgment entered in Knox Circuit Court, Barbourville, Kentucky 22–23

C. Complaint filed by Emily Jordan and Bufford Jordan in the Knox Circuit Court, Barbourville, Kentucky 24–25

Answer and Motion to Dismiss Complaint in Federal District Court 26–27

Order 28

Judgment 29

Memorandum of the Federal District Court 30–31

Notice of Appeal 32

IN THE

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October Term, 1982

No.

VERNON P. MOORE, - - - - *Petitioner,*

v.

EMILY JORDAN and
BUFFORD JORDAN, - - - - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on the 10th day of December, 1981.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It affirmed a judgment of United States District Court for the Eastern District of Kentucky which enforced a judgment of the Court of Common Pleas of Warren County, Ohio.

JURISDICTION

The judgment of the United States Court of Appeals was entered on December 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Common Pleas, Warren County, Ohio, have jurisdiction in a malpractice action over an attorney at law arising from acts of professional negligence which allegedly occurred in a civil action filed in the Knox Circuit Court in Barbourville, Kentucky; and where the Kentucky attorney had no contact, with the plaintiffs-appellees in Ohio, nor any contact with the State of Ohio at all?

2. Did the defendant-appellant attorney forfeit his right to question the jurisdiction of the Court of Common Pleas of Warren County, Ohio by his failure to appeal from that Court's Order overruling his motion to dismiss the action against him for lack of jurisdiction?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV

Section 1.

". . . [n]or shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

STATEMENT OF THE CASE

The Respondents, Emily Jordan and Bufford Jordan, filed a three count Complaint against the Petitioner, Vernon P. Moore. In the first two counts they alleged that they are citizens of the State of Ohio and

that Moore is a citizen of Kentucky; that the amount in controversy exceeds the sum of $10,000.00.

They state that on October 15, 1979, they obtained judgments against Moore in the Court of Common Pleas of Warren County, Ohio in the amounts of $60,000.00 and $16,043.25, with interest and costs. A certified copy of the judgment is attached to their Complaint.

They then allege that "the issue of jurisdiction was raised by the Petitioner, Moore, through a special appearance and the Court of Common Pleas of Warren County, Ohio, found the Petitioner was fully subject to its jurisdiction; that the "Petitioner has not filed an appeal and the time for doing so has expired."

In Count III of the Complaint sets forth substantially the same claim for relief sought by the Jordans in the Court of Common Pleas, Court of Warren County, Ohio, and for which they obtained their judgments against Moore and for which they filed suit in Federal Court in the Eastern District of Kentucky.

In that Count III they state that Moore was a duly licensed attorney in the Commonwealth of Kentucky and maintains his office and practice in Barbourville, Knox County, Kentucky. The Jordans were injured in an automobile accident in Knox County, Kentucky, caused by the negligence of one J. C. Phillips. Then attorney Moore entered into an agreement with Scott H. Ray, Jr., a member of the Ohio Bar, whereby they were to file a Complaint and institute litigation for the injuries sustained by the Jordans in Knox County, Kentucky.

The Jordans then say that attorney Moore let the statute of limitations expire before filing their Complaint in Knox County, Kentucky. A copy of the Summary Judgment entered by the Knox Circuit Court in Kentucky is attached to their Complaint in Federal Court.

The Judgment of the Common Pleas Court of Warren County, Ohio, provided in part that:

> "This cause came on regularly for hearing before the above Court on the Complaint of the Plaintiff, Plaintiffs appearing with their attorney and the Defendant, Scott H. Ray, Jr., appearing with his attorney, but the Defendant, Vernon P. Moore, not appearing either in person or by attorney. The default of the defendant, Vernon P. Moore, for failure to answer or otherwise appear having been entered by the Clerk, such default was confirmed and duly ordered by the Court.
>
> "The Court finds that at the time of filing of this action defendant, Vernon P. Moore, was a resident of the State of Kentucky, that he was duly and regularly served with summons and a copy of the Complaint by certified mail on July 19, 1976, and that defendant is fully subject to the jurisdiction of this Court. The Court further finds that it has jurisdiction of the subject matter of this action under the constitution and laws of this state, and that the judgment herein made is within the lawful jurisdiction of the Court."

The Petitioner, Moore, filed an Answer and Motion to dismiss the Complaint against him in Federal Court alleging that after the Complaint was filed against him

in the Common Pleas Court of Warren County, Ohio, he filed in that Court a special answer and appeared solely for the purpose of contesting and denying the Court's jurisdiction over him. He then stated that the Common Pleas Court exercised an in personam jurisdiction over him in violation of his rights under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. Moore stated that he had carried on no activity whatsoever in the State of Ohio and had no "minimum contacts" with the State of Ohio whatsoever.

The Respondents filed a motion for summary judgment in the Federal District Court and that Court entered an Order for the parties to file memoranda and affidavits in support of their respective positions.

Thereafter the District Court entered Judgment for the plaintiff-appellees against the Petitioner, Moore, in the amounts of $60,000.00 and $16,043.25, upon the judgments rendered by the Common Pleas Court of Warren County, Ohio, for the reasons set forth in the Court's Memorandum filed simultaneously.

REASONS FOR GRANTING THE WRIT

I

Where the Court of Common Pleas of Warren County, Ohio asserted jurisdiction in a malpractice action over an attorney who practiced in Kentucky for an act of professional negligence which occurred in connection with a civil action filed by him in the Knox Circuit Court in Barbourville, Kentucky, and that Kentucky attorney had no contact with the respondent clients in Ohio, nor any contact with the State of Ohio, it acted without authority and in violation of the petitioner's right to due process under the Fourteenth Amendment.

The law upon this question is not in dispute. In *Kulko* v. *California Superior Court,* 436 U. S. 84, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978), the Supreme Court stated:

> "The Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants. See *Shaffer* v. *Heitner,* 433 U. S. 186, 198-200, 55 L. Ed. 2d 683, 97 S. Ct. 2569 (1977). It has long been the rule that a valid judgment interposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant. *Pennoyer* v. *Neff,* 95 U. S. 714, 732-733, 24 L. Ed. 565 (1878); *International Shoe Co.* v. *Washington,* 326 U. S., at 316, 90 L. Ed. 95, 66 S. Ct. 154, 161 ALR 1057. The existence of personal jurisdiction, in turn, depends upon the presence of reasonable notice to the defendant that an action has been brought.

Mullane v. *Central Hanover Trust Co.*, 339 U. S. 306, 313-314, 94 L. Ed. 865, 70 S. Ct. 652 (1950), and a sufficient connection between the Defendant and the forum State as to make it fair to require defense of the action in the forum. *Milliken* v. *Meyer*, 311 U. S. 457, 463-464, 85 L. Ed. 278, 61 S. Ct. 339, 132 ALR 1357 (1940). In this case, appellant does not dispute the adequacy of the notice that he received, but contends that his connection with the State of California is too attenuated, under the standards implicit in the Due Process Clause of the Constitution, to justify imposing upon him the burden and inconvenience of defense in California. . . . While the interests of the forum State and of the Plaintiff in proceeding with the cause in the Plaintiff's forum of choice are, of course, to be considered, see *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, 223, 2 L. Ed. 2d 223, 78 S. Ct. 199 (1957), an essential criterion in all cases is whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that State. *International Shoe Co.* v. *Washington, supra,* at 316-317, 319, 90 L. Ed. 95, 66 S. Ct. 154, 161 ALR 1057. Accord, *Shaffer* v. *Heitner, supra,* at 207-212, 53 L. Ed. 2d 683, 97 S. Ct. 2569; *Perkins* v. *Benquet Mining Co.*, 342 U. S. 437, 445, 96 L. Ed. 485, 72 S. Ct. 413, 47 Ohio Ops. 216, 63 Ohio L. Abs. 146 (1952)."

In the instant case, Emily Jordan and her husband, Bufford Jordan, had an automobile accident in Knox County, Kentucky. Being residents of Ohio, they retained the services of a member of the Ohio Bar,

Scott Ray, Jr., who in turn came to Knox County, Kentucky, and associated with a local attorney, Vernon P. Moore, to represent the Jordans. There is no fact nor circumstance from which it can reasonably be inferred that the defendant-appellant, Vernon P. Moore, had any contact with the forum state of Ohio, much less a "minimum contact."

The assertion or claim of the Court of Common Pleas of Warren County, Ohio, that "defendant [Moore] is fully subject to the jurisdiction of this Court" and that it has "jurisdiction of the subject matter of this action under the constitution and laws of this State, and that the judgment herein made is within the lawful jurisdiction of this Court," is not supported by any fact or circumstance. Indeed, that Court must demonstrate "a sufficient connection between the defendant and the forum State as to make it fair to require defense of the action in the forum." *Kulko, supra.* Indeed one might asks, why, if the Jordans could litigate in the Knox Circuit Court, in Kentucky, about their personal injuries, they could not likewise litigate in that state with an attorney who attempted to represent them in that state and allegedly botched up their case.

The District Court in the memorandum filed with its judgment stated that:

> "The controlling fact in the case was admitted by the defendant in paragraph 2 of his answer, where he admitted he made a special appearance in the Ohio action for the purpose of challenging that

> court's in personam jurisdiction. This challenge was unsuccessful, because the certified copy of that court's judgment filed here by plaintiffs recites its finding that Mr. Moore 'is fully subject to the jurisdiction of this Court'."

May a court acquire jurisdiction based upon a mere assertion that it has jurisdiction unsupported by any factual underpinning?

In *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U. S. 286, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980), the Supreme Court again addressed the question of jurisdiction.

> "The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant. *Kulko* v. *Superior Court,* 436 U. S. 84, 91, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978). A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere. *Pennoyer* v. *Neff,* 95 U. S. 714, 732-733, 24 L. Ed. 565 (1878). Due process requires that the defendant be given adequate notice of the suit, *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306, 313-314, 94 L. Ed. 865, 70 S. Ct. 652 (1950), and be subject to the personal jurisdiction of the court, *International Shoe Co.* v. *Washington,* 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154, 161 ALR 1057 (1945). In the present case, it is not contended that notice was inadequate; the only question is whether these particular petitioners were subject to the jurisdiction of the Oklahoma Courts.

As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exists 'minimum contacts' between the defendant and the forum State. *International Shoe Co.* v. *Washington, supra*, at 316, 90 L. Ed. 95, 66 S. Ct. 154, 161 ALR 1057. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects and defends against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

The protection against inconvenient litigation is typically described in terms of 'reasonableness' or 'fairness'. We have said that the defendant's contacts with the forum State must be such that maintenance of the suit 'does not offend "traditional notions of fair play and substantial justice."' *International Shoe Co.* v. *Washington, supra,* at 316, 90 L. Ed. 95, 66 S. Ct. 154, 161 ALR 1057, quoting *Milliken* v. *Meyer,* 311 U. S. 457, 463, 85 L. Ed. 278, 61 S. Ct. 339, 132 ALR 1357 (1940). The relationship between the defendant and the forum must be such that it is 'reasonable . . . to require the corporation to defend the particular suit which is brought there.' . . . 'Thus, the Due Process Clause "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations."' *International Shoe Co.* v. *Washington, supra,* at 319, 90 L. Ed. 95, 66 S. Ct. 154, 161 ALR 1057. Even if the defendant would suffer minimal or no

> inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment. *Hanson* v. *Denckla, supra,* at 1251, 1254, 2 L. Ed. 2d 1283, 78 S. Ct. 1228." (Emphasis supplied.)

Thus, *World-Wide Volkswagen* teaches the unqualified rule that "A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere." *Supra.*

If the judgment is void in Ohio, it is void in Kentucky. A judgment rendered in violation of due process in Ohio cannot be resurrected or have sanctity imparted to it by the cloak of full faith and credit in another jurisdiction.

II

The Petitioner, Moore, did not forfeit his right to question the jurisdiction of the Court of Common Pleas of Warren County, Ohio, but his failure to appeal from that court's order overruling his Motion to dismiss the action against him for lack of jurisdiction.

At some point after the defendant-appellant, Moore, appeared specially in the Common Pleas Court of Warren County, Ohio, contesting that Court's in personam jurisdiction over him and seeking to have the action dismissed against him, that Court overruled

his motion, found him in default, entered judgment against him and subsequently permitted a jury to assess damages for the Jordans.

In overruling his motion to dismiss the action against him in Federal Court, that Court, reasoned that even if his argument asserting lack of jurisdiction in Ohio is correct,

> ". . . it would not prevent the entry of judgment against defendant by this Court. Under the well established doctrine of *Baldwin* v. *Iowa State Traveling Men's Association,* 283 U. S. 522, 524 (1931), the due process guarantee gives a party 'no right to litigate the same question twice.' Mr. Moore has already litigated the jurisdictional issue once; he made a special appearance for this very purpose in the prior Ohio action. He failed to appeal or directly attack the adverse decision which resulted. Having chosen this course of action, he cannot now collaterally attack the resulting judgment in this Court. *Baldwin, supra,* is indistinguishable and controlling. The Ohio judgment is res judicata on the jurisdictional issue.
>
> The defendant argues there is a need to delay the resolution of this action until he obtains a certified copy of the record of the Ohio case 'for the purpose of showing what basis the [Ohio] Court had for rendering Judgment.' Such a delay is not necessary, because under the doctrine of *Baldwin* v. *Iowa State Traveling Men's Association, supra,* and 28 U.S.C. §1738, this Court could not review even a clearly erroneous state court decision under the circumstances of this case."

The position of the District Court is counter-productive and self-defeating to the very purpose of the ruling of the Supreme Court as enunciated in that line of cases such as *World-Wide Volkswagen Corp.* and *Kulko, supra.*

In *Kulko* the Court spoke in terms of it being "reasonable" and "fair" to require the defendant to defend an action in an alien and distant forum. In *Volkswagen,* it spoke in terms of "protection against inconvenient litigation" and whether the "defendant's contacts with the forum State must be such the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington,* 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154, 161 ALR 1057 (1945).

If the requirement of *Baldwin* v. *Iowa State Traveling Men's Association, supra,* is complied with, the appellant in this case would have been required unreasonably and unfairly to have litigated the question in point all the way through the appellate court system of the State of Ohio, at great expense and inconvenience. In those circumstances he might just as well have litigated the case in Ohio on its merits.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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606-546-4162

Attorney for Petitioner,
Vernon P. Moore

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 80-5389

EMILY JORDAN and
BUFFORD JORDAN - - - - *Plaintiff-Appellee*

v.

VERNON P. MOORE - - - *Defendant-Appellant*

ORDER—Filed December 10, 1981

BEFORE: MERRITT and KENNEDY, Circuit Judges and PRATT, District Court Judge.*

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be and it hereby is affirmed upon the opinion of the district court.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman, Clerk

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*Judge Pratt sitting by designation from the Eastern District of Michigan at Detroit.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

No. 80-51

EMILY JORDAN and
BUFFORD JORDAN - - - - - - - *Plaintiffs*

v.

VERNON P. MOORE - - - - - - - *Defendant*

COMPLAINT—Filed March 27, 1980

COUNT I

1. Plaintiffs are citizens of the State of Ohio and the Defendant is a citizen of the Commonwealth of Kentucky and the amount of controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2. That on or about October 31, 1979, Plaintiff, EMILY JORDAN, obtained a Judgment against the Defendant in the Common Pleas Court of Warren County, Ohio, in the sum of $60,000.00, plus costs and interest at the rate of 6% per annum from October 31, 1979. A certified copy of said Judgment is annexed hereto, made a part hereof, the same as if copied at length herein and is marked Exhibit "A". That no part of said Judgment, interest and costs has been paid.

3. That the issue of jurisdiction was raised by the Defendant, through a special appearance and the Court found that the Defendant was fully subject to its jurisdiction.

4. Defendant has not filed an appeal and the time for doing so has expired.

COUNT II

1. The Plaintiffs iterate and reaffirm all of the allegations of paragraph 1 of Count I above.

2. That on or about October 31, 1979, Plaintiff, BUFFORD JORDAN, obtained a Judgment against the Defendant in the Common Pleas Court of Warren County, Ohio, in the sum of $16,043.25, plus costs and interest at the rate of 6% per annum from October 31, 1979. A certified copy of said Judgment is annexed hereto, made a part hereof, the same as if copied at length herein and is marked Exhibit "A". That no part of said Judgment, interest and costs has been paid.

3. That the issue of jurisdiction was raised by the Defendant, through a special appearance and the Court found that the Defendant was fully subject to its jurisdiction.

4. Defendant has not filed an appeal and the time for doing so has expired.

COUNT III

1. Plaintiffs iterate and reaffirm all of the allegations contained in paragraph 1 of Count I above.

2. As an alternative count to Counts I and II, the Plaintiffs state that at all times mentioned herein, the Defendant, VERNON P. MOORE, was, and now is, an attorney, duly licensed to practice law in the Commonwealth of Kentucky, and does maintain an office for said purpose in Barbourville, Knox County, Commonwealth of Kentucky.

3. That the Defendant and one, Scott H. Ray, Jr., a duly licensed attorney in the State of Ohio, entered into an agreement whereby they were to file a Complaint and institute litigation for and on behalf of the Plaintiffs who had been injured in an automobile accident in Knox County, Kentucky, as a result of the negligence of one J. C. Phillips.

4. That the Defendant failed to timely commence said lawsuit and his negligence allowed the Defendant in said action to dismiss the cause of action on the ground that it was barred by the Statute of Limitations of Kentucky. A copy of the Summary Judgment in said action is filed herewith and made a part of this Complaint the same as if copied at length herein and marked Exhibit "B".

5. That if the Defendant had not been negligent in failing to commence said action before same was barred by the Kentucky Statute of Limitations, Plaintiffs would have recovered Judgments against J. C. Phillips in the amount of $100,000.00 for Plaintiff, EMILY JORDAN, and in the amount of $20,000.00 for Plaintiff, BUFFORD JORDAN. A copy of the original Complaint filed in the Knox Circuit Court is annexed hereto and made a part hereof the same as if copied at length herein and is marked Exhibit "C".

6. That by reason of the negligence of the Defendant, as hereinabove set forth, Plaintiffs have been damaged in the total amount of $120,000.00.

WHEREFORE, Plaintiff, EMILY JORDAN, demands Judgment against Defendant in the sum of $60,000.00; Plaintiff, BUFFORD JORDAN, demands Judgment against the Defendant in the sum of $16,043.25; in the alternative, Plaintiff, EMILY JORDAN, demands Judgment against Defendant in the sum of $100,000.00, and Plaintiff, BUFFORD JORDAN, demands Judgment against Defendant in the sum of $20,000.00; Plaintiffs demand trial by jury as regards Count III; they demand their costs expended in the Common Pleas Court of Warren County, Ohio and herein; they demand interest on the Judgment in the Common Pleas Court of Warren County, Ohio, at the rate of 6% per annum from October 31, 1979 until said Judgment is paid and they demand interest on Judgment rendered in this

Court from date of entry and they finally demand any other relief to which they may appear entitled.

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and

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and

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By: _____
Attorneys for Plaintiffs

EXHIBIT "A"

IN THE COMMON PLEAS COURT OF
WARREN COUNTY, OHIO

Case No. 39613

EMILY JORDAN, ET AL., - - - - *Plaintiffs,*

v.

SCOTT H. RAY, JR., ET AL., - - - *Defendants.*

JUDGMENT

This cause came on regularly for hearing before the above Court on the Complaint of the Plaintiffs, Plaintiffs appearing with their attorney and the Defendant, Scott H. Ray, Jr., appearing with his attorney, but the defendant, Vernon P. Moore, not appearing, either in person or by attorney. The default of the Defendant, Vernon P. Moore, for failure to answer or otherwise appear having been entered by the Clerk, such default was confirmed and duly ordered by the Court.

The Court finds that at the time of filing of this action defendant, Vernon P. Moore, was a resident of the State of Kentucky, that he was duly and regularly served with summons and a copy of the Complaint by certified mail on July 19, 1976, and that defendant is fully subject to the jurisdiction of this Court. The Court further finds that it has jurisdiction of the subject matter of this action under the constitution and laws of this state, and that the judgment herein made is within the lawful jurisdiction of the Court.

After presentation of evidence regarding the alleged liability of defendants, Scott H. Ray, Jr., and Vernon P. Moore, the Court ordered, adjudged and decreed that defendant, Scott H. Ray, Jr., was not liable and that the Complaint as to him should be dismissed, but that the case against defendant, Vernon P. Moore, should remain. Further, the Court ordered that an evidentiary hearing regarding damages be had, and said hearing was conducted on October 31, 1979, plaintiffs and counsel appearing, but defendant, Vernon P. Moore, again failing to appear.

After presentation of evidence regarding damages, and for good cause shown, it is therefore ordered adjudged and decreed that plaintiff, Emily Jordan, have and recover of and from defendant, Vernon P. Moore, the sum of $60,000.00. It is further ordered that plaintiff, Bufford Jordan, have and recover of and from the defendant, Vernon P. Moore, the sum of $16,043.25; for a total judgment in favor of plaintiffs, and against defendant, Vernon P. Moore, in the sum of $76,043.25 as compensatory damages, and costs herein to be taxed hereafter together with interest and all said amounts at the rate of 6% per annum from the date hereof until paid in full.

/s/_____

Judge

[October 31, 1979]

EXHIBIT "B"

COMMONWEALTH OF KENTUCKY
KNOX CIRCUIT COURT

Civil Action No. 5439

EMILY JORDAN,
BUFFORD JORDAN and
DOUGLAS JORDAN, an Infant, - - - - - *Plaintiffs,*

v.

J. C. PHILLIPS, - - - - - - - *Defendant.*

SUMMARY JUDGMENT

This action seeking to recover damages for personal injuries allegedly sustained by the plaintiffs in a motor vehicle collision on July 27, 1974, was filed in this Court on July 25, 1975, at which time summons was issued against the defendant directed to the Sheriff of Franklin County for service upon the Secretary of State as process agent for the defendant under the provisions of Chapter 188, Kentucky Revised Statutes. Counsel for the plaintiffs mailed the summons to the Sheriff of Franklin County on August 1, 1975, and was received by the Sheriff on August 4, 1975. The summons was served on the Secretary of State the same day.

Defendant's Motion to dismiss has been heard orally and thereafter submitted on briefs. The issue presented is whether the action was commenced within the period prescribed by KRS 413.140. Since the Court has considered affidavits and exhibits filed in the record herein, the de-

fendant's motion will be considered as a motion for summary judgment under CR 56. CR 12.02, Whisler v. Allen, Ky., 380 S. W. 2d 70.

The Court concludes that the action was not commenced within one year after the cause of action accrued to the plaintiffs; that no genuine issue of material fact exists with respect thereto and that the defendant is entitled to judgment as a matter of law with respect to the claims asserted by the plaintiffs, Emily Jordan and Bufford Jordan. KRS 413.140; CR 3; KRS 413.250; *Brock* v. *Turner Fuel Co.*, 178 S. W. 2d 427; *L & N Railroad Co.* v. *Little*, 95 S. W. 2d 253; *Bluegrass Mining Co.* v. *North*, 96 S. W. 2d 757.

It is therefore ORDERED that the action of the plaintiffs, Emily Jordan and Bufford Jordan, be and the same is hereby dismissed at their costs.

It is further ORDERED that the defendant's Motion to dismiss the complaint as amended and the action of the infant defendant, Douglas Jordan, be and the same is hereby overruled.

This March 23, 1976.

/s/ Robert H. Helton, Jr.
Judge, Knox Circuit Court

Copy to:

Hon. Scott H. Ray, Jr.
Hon. Vernon P. Moore
Hon. Robert L. Milby

EXHIBIT "C"

COMMONWEALTH OF KENTUCKY
KNOX CIRCUIT COURT

Civil Action No. 5439

EMILY JORDAN,
BUFFORD JORDAN and
DOUGLAS JORDAN, an Infant, - - - - *Plaintiffs,*

v.

J. C. PHILLIPS, - - - - - - *Defendant.*

COMPLAINT—Filed July 25, 1975

Comes the Plaintiffs, through counsel, and for their Complaint would say as follows:

1. That on or about July 27, 1974, on a public highway called U. S. 25E at mile post #5 in the County of Knox, Commonwealth of Kentucky, Defendant negligently drove a motor vehicle into and against the rear of the vehicle occupied by all of the Plaintiffs who were proceeding in a lawful manner in a generally southerly direction upon said highway.

2. That as a result of said collision, all Plaintiffs suffered bodily injuries, physical and mental pain, all of which are permanent and each Plaintiffs' earning power was permanently impaired.

3. That in addition, the first two named Plaintiffs lost time from the transaction of business and suffered loss of wages and incurred and shall continue to incur, hospital and medical expenses.

WHEREFORE, Plaintiffs demand judgment against the Defendant as follows:

1. For Emily Jordan..... $100,000 compensatory
2. For Bufford Jordan..... 20,000 compensatory
3. For Douglas Jordan..... 5,000 compensatory
4. That a summons against the Defendant be forwarded to the Sheriff of Franklin County, Kentucky for service on the Secretary of State, who by non-resident motorists law, is process agent for the Defendant.
5. For their costs herein expended, trial by jury, and any and all other relief to which they may appear entitled.

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Attorney for Plaintiffs
4 South Broadway
Lebanon, Ohio 45036
Telephone: (513) 932-4856

Vernon Poorman Moore
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P. O. Box 174
Barbourville, Ky. 40906
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

Civil No. 80-51

EMILY JORDAN and
BUFFORD JORDAN, - - - - - - - *Plaintiffs,*

v.

VERNON P. MOORE, - - - - - *Defendant.*

ANSWER AND MOTION TO DISMISS

Comes the defendant, Vernon P. Moore, by counsel, and for answer to the Complaint against him herein would respectfully represent and show to the Court as follows:

1. That each Count of the Complaint should be dismissed and held for naught because it fails to state a claim for which relief may be granted.

2. That heretofore, subsequent to the plaintiff's filing an action in the Court of Common Pleas of Warren County, Ohio, the Defendant, Vernon P. Moore, filed a special answer and appeared solely for the purpose of contesting and denying that Courts in personam jurisdiction over him.

3. That the Court of Common Pleas of Warren County, Ohio, exercise of in personam jurisdiction over the defendant, Vernon P. Moore, is a denial of the defendant's rights under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, he having carried on no activity whatsoever in the State of Ohio and he not having any "minimum contacts" with the forum state of Ohio whatsoever, the Complaint herein should be dismissed.

4. That such cause of action as the Plaintiffs may have against this defendant are barred by the statute of limitations in such cases made and provided.

5. That with regard to the allegations contained in Count I of the Complaint, he admits the allegations contained in paragraphs 1, 2, and 4; and he admits that part of paragraph 4, except where it is stated that "the Court found that the defendant was fully subject to its jurisdiction", which he denies.

6. That with regard to Count II of the Complaint, the defendant admits the allegations contained in paragraphs 1, 2, and 4, but he denies that part of paragraph #3 wherein it alleged that "the Court found that the defendant was fully subject to its jurisdiction", which he denies.

7. That with regard to Count III of the Complaint, the defendant admits the allegations contained in paragraph numbered 2; and he denies all other allegations contained in paragraphs 1, 3, 4, 5 and 6.

WHEREFORE, having fully answered the Complaint against him, the defendant demands that same be dismissed and held for naught; he demands a trial by jury; his costs herein expended and all other proper and equitable relief to which he may otherwise appear entitled.

Lowell W. Lundy
P. O. Box 380
Barbourville, Ky. 40906
Attorney for Defendant
606-546-4162
[April 28, 1980]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

Civil No. 80-51

EMILY JORDAN and
BUFFORD JORDAN, - - - - - - - *Plaintiffs,*

v.

VERNON P. MOORE, - - - - - *Defendant.*

ORDER

In accordance with the Memorandum of even date, it is hereby ORDERED AS FOLLOWS:

1. The motion by the defendant to dismiss be and is sustained as to Count 3 of the Complaint only, and Count 3 of the Complaint be and is dismissed.

2. The motion by the plaintiffs for summary judgment be and is sustained.

This 17 day of October, 1980.

/s/ Eugene E. Siler, Jr.
Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

Civil No. 80-51

EMILY JORDAN and
BUFFORD JORDAN, - - - - - - - *Plaintiffs,*

v.

VERNON P. MOORE, - - - - - *Defendant.*

JUDGMENT

In accordance with the reasons set forth in the Memorandum of even date, it is hereby

ORDERED AND ADJUDGED that the plaintiff, Emily Jordan, be and is granted judgment against the defendant, Vernon P. Moore, in the amount of $60,000.00, plus interest at the rate of 6% per annum from the date of October 31, 1979, until paid, and the plaintiff, Bufford Jordan, be and is granted judgment against the defendant, Vernon P. Moore, in the sum of $16,043.25, plus interest at the rate of 6% per annum from the date of October 31, 1979, until paid. Defendant shall pay the costs of this action.

This 17 day of October, 1980.

/s/ Eugene E. Siler, Jr.
Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

Civil No. 80-51

EMILY JORDAN and
BUFFORD JORDAN - - - - - - - *Plaintiffs*

v.

VERNON P. MOORE - - - - - *Defendant*

MEMORANDUM

This is a diversity suit brought to enforce a $76,043.25 judgment previously rendered by an Ohio state court. The case is presently before the Court for consideration of a summary judgment motion filed by the plaintiffs, Emily and Bufford Jordan, both Ohio citizens. The defendant, a Kentucky attorney, has responded by attempting to collaterally attack the earlier judgment. He contends that he had no connection with the state of Ohio sufficient to enable its courts to exercise long-arm jurisdiction over his person.

The controlling fact in the case was admitted by the defendant in paragraph 2 of his answer, where he admitted he made a special appearance in the Ohio action for the purpose of challenging that court's in personam jurisdiction. This challenge was unsuccessful, because the certified copy of that court's judgment filed here by plaintiffs recites its finding that Mr. Moore "is fully subject to the jurisdiction of this Court."

Mr. Moore now argues that the latter conclusion violates the due process clause of the Fourteenth Amendment, as interpreted by the Supreme Court in many cases, including *Kulko* v. *California Supreme Court*, 436 U. S. 84 (1978)

("minimum contacts" with forum necessary before state can exercise "long arm" jurisdiction). However, even if this argument were correct, it would not prevent the entry of judgment against defendant by this Court. Under the well established doctrine of *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522, 524 (1931), the due process guarantee gives a party "no right to litigate the same question twice." Mr. Moore has already litigated the jurisdictional issue once: he made a special appearance for this very purpose in the prior Ohio action. He failed to appeal or directly attack the adverse decision which resulted. Having chosen this course of action, he cannot now collaterally attack the resulting judgment in this Court. *Baldwin, supra,* is indistinguishable and controlling. The Ohio judgment is res judicata on the jurisdictional issue.

The defendant argues there is a need to delay the resolution of this action until he obtains a certified copy of the record of the Ohio case "for the purpose of showing what basis the [Ohio] Court had for rendering Judgment." Such a delay is not necessary, because under doctrine of *Baldwin* v. *Iowa State Traveling Men's Association, supra,* and 28 U.S.C. § 1738, this Court could not review even a clearly erroneous state court decision under the circumstances of this case.

The plaintiffs have plead alternatively in Count III for the same cause of action already litigated in Ohio. However, as the Ohio judgment is res judicata for the defendant, it is likewise res judicata for the plaintiffs, so the motion to dismiss will be granted on Count III of the Complaint.

Summary Judgment for the plaintiffs will be entered in accordance with the judgment from Ohio.

This 17 day of October, 1980.

/s/ Eugene E. Siler, Jr., Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

Civil No. 80-51

EMILY JORDAN and
BUFFORD JORDAN - - - - - - - *Plaintiffs*

v.

VERNON P. MOORE - - - - - *Defendant*

NOTICE OF APPEAL

Notice is hereby given that Vernon P. Moore, Defendant above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final Judgment and Order entered in this action on the 17th day of October, 1980.

This the 30 day of October, 1980.

/s/ Lowell W. Lundy
P. O. Box 380
Barbourville, Ky. 40906
Attorney for Defendant
606-546-4162

Opposition

Office - Supreme Court, U.S.
FILED
APR 28 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1495

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

VERNON P. MOORE — PETITIONER

VS.

EMILY JORDAN and
BUFFORD JORDAN — RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ATTORNEYS FOR RESPONDENTS

QUESTION PRESENTED

Where a Kentucky attorney appeared before the Court of Common Pleas, Warren County, Ohio, to contest that Court's jurisdiction over him in a malpractice action and where that attorney failed to appeal from the determination on that issue against him, did the Kentucky attorney have the right to re-litigate the jurisdictional issue by collaterally attacking the judgment of the Court of Common Pleas, Warren County, Ohio, in a later proceeding in Federal Court for enforcement of that judgment?

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 81-1495

VERNON P. MOORE — PETITIONER

VS.

EMILY JORDAN and
BUFFORD JORDAN — RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondents pray that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

REASONS FOR DENYING THE WRIT

Where a Kentucky attorney appeared before the Court of Common Pleas. Warren County. Ohio. to contest that court's jurisdiction over him in a malpractice action and where that attorney failed to appeal from the determination on that issue against him. the Kentucky attorney did not have the right to re-litigate the jurisdictional issue by collaterally attacking the judgment of the Court of Common Pleas. Warren County. Ohio. in a later proceeding in Federal Court for enforcement judgment.

The issue presented in this case is simple, one clearly controlled by an established doctrine of this Court. The question presented to the Court by the case at bar is precisely the question raised in the 1931 case, **Baldwin v. Iowa State Traveling Men's Association,** 283 U.S. 522. In **Baldwin, supra,** an action was brought against the Defendant, Iowa State Traveling Men's Association, in the State of Missouri. The Defendant responded to the action by specially appearing to contest the jurisdiction of the Court. The Court held that jurisdiction was proper and rendered a Judgment against the Defendant. The Defendant did not appeal the Judgment and when the time for appeal had expired, the Plaintiff, Baldwin, sought to enforce the Judgment in Iowa. The Defendant then raised the previously litigated issue of lack of jurisdiction by the Missouri Court.

This Court ruled in favor of the Plaintiff, Baldwin, holding that a Defendant who appears specially to contest jurisdiction and loses, must raise that issue on appeal or be forever barred from collaterally attacking said Judgment. This Court elaborated on its holding by explaining the other options open to the Defendant but of which he did not avail himself:

> The substantial matter for determination is whether the Judgment amounts to res judicata on the question of the jurisdiction of the court which rendered it over the person of the Respondent. It is of no moment that the appearance was a special one expressly saving any submission to such jurisdiction. That fact would be important upon appeal from the Judgment, and would save the question of the propriety of the court's decision on the matter even though after the motion had been overruled the Respondent had proceeded, subject to a reserved objection and exception, to a trial on the merits. **Harkness v. Hyde**, 98 U.S. 476, 25 L. ed. 237; **Goldey v. Morning News**, 156 U.S. 518, 39 L. ed. 517, 15 S. Ct. 559; **Toledo R. & Light Co., v. Hill**, 244 U.S. 49, 61 L. ed. 982, 37 S. Ct.

591; **Hitchman Coal and Coke Co., v. Mitchell,** 245 U.S. 229, 62 L. ed. 260, L.R.A. 1918C, 497, 38 S. Ct. 65, Ann. Cas. 1918B, 461; **Morris & Co., v. Skandinavia Ins. Co.,** 279 U.S. 405, 73 L.ed. 762, 49 S. Ct. 360.

The special appearance gives point to the fact that the Respondent entered the Missouri Court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to Judgment and the present suit had been brought thereon, Respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. **Thompson v. Whitman**, 18 Wall. 457, 21 L.ed. 897; **Pennoyer v. Neff**, 95 U.S. 714, 24 L.ed. 565; **Hart v. Sansom**, 110 U.S. 151, 28 L.ed. 101, 3 S. Ct. 596; **Wetmore v. Karrick**, 205 U.S. 141, 51 L.ed. 745, 27 S. Ct. 434; **Bigelow v. Old Dominion Copper Min. & Smelting Co.,** 225 U.S. 111, 56 L.ed. 1009, 32 S. Ct. 641, Ann. Cas. 1913E, 875; **McDonald v. Mabee,** 243 U.S. 90, 61 L.ed. 608, L.R.A. 1917F, 458, 37 S. Ct. 343. It had also the right to appeal from the decision of the Missouri District Court, as is shown by **Harkness v. Hyde,** 98 U.S. 476, 25 L.ed. 237, supra, and the other authorities cited. It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the Judgment in question resulted.

Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be

> considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the Judgment of the tribunal to which he has submitted his cause.

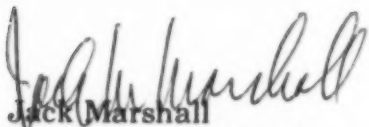
Baldwin, supra, at pp. 525-526.

Defendant's arguments throughout the District Court and Court of Appeals proceedings and those now presented in this appeal, go to the merits of the jurisdictional issue. Therefore, these arguments represent a collateral attack which is clearly not allowed under the indistinguishable and controlling **Baldwin** case. The court below followed the controlling precedent of this Court in ruling against the Petitioner. The decision of the court below conflicts with neither the decisions of this Court nor any other circuit. Therefore, the Petitioner has failed to demonstrate any of the reasons for granting certiorari contained in Rule 17 of the Rules of the Supreme Court and his petition should be denied.

CONCLUSION

The **Baldwin** doctrine is simple and fair. A Defendant who appears specially to contest jurisdiction and loses must raise that issue on appeal or be forever barred from collaterally attacking a resulting Judgment. A Defendant who believes a trial court lacks jurisdiction over him has the option of not appearing at all which then allows a collateral attack on a resulting Judgment. The Petitioner chose his course of action by specially appearing. He cannot now be heard to complain that he should be able to litigate the jurisdictional issue twice. Upon these facts, the granting of certiorari would not be a provident exercise of this Court's jurisdiction. The Petition should be denied.

Respectfully Submitted,



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